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VOL. 25 FEBRUARY, 1950 No. 6

A WORD FROM THE PRESIDENT

Clarence B. Runkle

THERE has recently been circulated "A Report to the Bar in behalf of the Freedom of Advocacy" by a self-styled and self-constituted "Bar Committee to Defend Lawyers' Right of Advocacy." Considerable confusion has resulted from this use of the appellation, "Bar Committee." To some this has indicated an official committee of our Association; to others it has meant a committee of State Bar. *It means neither.* I hope our members will be alert to every opportunity to correct any such misapprehension.

This terminology, obviously designed to confuse, must be regarded as reprehensible. One of our major quests is the boundary between the legitimate use and the irresponsible if not traitorous abuse of the freedoms guaranteed by the Bill of Rights. It might be more salutary to rechristen our great charter the Bill of Responsibilities. There is no true right or freedom that is not integral with responsibility. Let's quit prattling about "Freedoms-*from*," whether fear, want or any other hazard. They are not to be numbered among or mentioned in the same breath with the virile responsibility-freedoms of Americanism. It is only the "Freedoms-*of*" that call for courage, self-reliance and integrity. Freedom *of* speech should produce truth, not confusion.

"Freedom of Advocacy" likewise implies responsible exercise of advocacy. This "Report" attacks Judge Medina for his rulings in the recent New York trial of eleven Communists. I have not had access to the transcript of that trial. But the news reports so consistently revealed an abuse of the "Right of Advocacy" by defense counsel that, until the issues are properly resolved in the pending appeals by those convicted of contempt, I prefer to

place my confidence in the trial judge who appeared to be a paragon of patience and self-control, rather than in the authors of this dubious "Report."

In choosing sides between the cause of democracy and Americanism and the cause of statism and totalitarianism, between freedom and tyranny, many errors have been and will be made. It is better to err on the side of the former than of the latter.

Our Board of Trustees, recognizing that certain practices have developed or been exhibited in some of the mushroom bureaus or administrative agencies and in some of the legislative committees and even in some courts, which threaten or impair the function of advocacy, feel that the resulting problem should have the attention of members of the bar who are above suspicion of chronic conspiracy to undermine faith in and allegiance to our established institutions. Accordingly, the Association's Committee on Constitutional Rights has been directed to make a survey and recommend appropriate action to be taken by the Association, either through its Board of Trustees or otherwise.

In the meantime, let us remember that effective use of the "Right of Advocacy" necessitates proper basic training of and adequate immediate preparation by the advocate. Being right and respectfully courageous will do much to dispel these threats.

CLARENCE B. RUNKLE.

BAR BULLETIN CUMULATIVE INDEX AVAILABLE AT COUNTY LAW LIBRARY

The BAR BULLETIN Committee is pleased to announce that a comprehensive index of volumes 1 to 23, inclusive, now is available in the County Law Library.

Throughout the twenty-three years covered by this index (1925-1948) many articles on legal subjects written by experts, and much material of general and historical interest, have been published. No longer is it necessary to scan the index of each volume to find this material. In the new comprehensive index it can be located under the headings of the author's name, or of the subject, or of the topic.

THE DRUNK DRIVING PROBLEM

Mildred L. Lillie, Judge of the Superior Court*

Mildred L. Lillie

NORMALLY the problem of the drunk driver is viewed in relation to traffic safety and police administration, but actually our courts influence the control of the problem more than the average person realizes. The proper disposition of cases of this nature can well contribute to the reduction of drunk driving on our streets.

At the outset, not all persons consider the offense of driving while under the influence of intoxicating liquor in the same light. One view is based on the theory that by reason of its legal definition, and the very nature of the offense, the act of driving while under the influence of intoxicating liquor is seldom intentionally committed, that although it is true that the consumption of alcohol in the first instance is deliberate, as is the act of thereafter driving an automobile, no normal person while sober would even consider operating a motor vehicle while in an intoxicated condition, yet by the time that sober person has consumed enough alcohol to affect him, he does not sufficiently comprehend his condition, does not realize his ability to operate an automobile is impaired, and cannot recognize the danger or probable consequences.

The more realistic view is that, unfortunately, death or injury resulting to an innocent victim because of conduct of a drunken motorist is just as real, just as tragic, and just as permanent and painful as though intentionally and deliberately inflicted: and lack of intention should not excuse such violations which are yearly responsible for hundreds of deaths, and for millions of dollars' worth of property damage and personal injury.

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*Mildred L. Lillie is a judge of the Superior Court for Los Angeles County. She was born in Ida Grove, Iowa, on January 25, 1915. She attended the elementary school and high school at Oakdale, California. She holds two degrees from the University of California: A.B. in Economics and Political Science (1935), and LL.B. (Boalt Hall, 1938). Judge Lillie's professional experience includes two years (1938-1939) in the office of the City Attorney of Alameda; two and a half years (1940-1942) in private practice in Fresno; four and a half years (May, 1942, to October, 1946) as Assistant United States Attorney in Los Angeles; and private practice in Los Angeles until April, 1947, when she was appointed Judge of the Municipal Court in Los Angeles. In October, 1949, Judge Lillie was appointed a judge of the Superior Court. While Judge Lillie was serving in the Municipal Court she presided for almost a year in the division to which was assigned all misdemeanor drunk driving cases.

The existence of this difference of opinion, together with the seriousness of the added penalty of loss of driving privileges upon conviction, is responsible for several factors which affect the disposition of these cases by our courts.

Perhaps one of the most serious is the realization that because of the inadequacy of the method used to determine sobriety, some innocent persons, either nondrinkers or mild social drinkers, are subjected to arrest and possible conviction; and as many who, through their conduct, constitute themselves a hazard in an automobile are released, or, if prosecuted, cannot be convicted.

The method of determining sobriety, because of its inherent weaknesses, is subject to much criticism. Whether or not a driver is under the influence at the time of arrest is determined solely on the opinion of a police officer and other witnesses, and his subsequent conviction or acquittal depends almost entirely upon the testimony of lay persons based purely on observation. The Standard Sobriety Test used by most police officers consists of observation of various details about the driver; such as, manner of speech, appearance of body, face, eyes, clothing, odor of breath, muscular co-ordination and control, manner of operation of the vehicle, general attitude and what the driver was doing at the time he was apprehended. Consideration is frequently given to the admissions, if any, made by the driver or other occupants of the car relating to the amount and kind of liquor consumed, the amount of food consumed by the driver before or after consumption of liquor, and the amount of rest had by him within the last twenty-four hours.

It is obvious, therefore, that whether a driver is arrested or subsequently convicted depends solely upon the layman's accuracy and good faith in recognizing, interpreting and reporting his outward appearances and conduct. Police officers, though generally conscientious, tolerant, and honest, are not above the common faults that plague the average person in exercising judgment and discretion, and it is too easy for the scientifically untrained to unintentionally misidentify and misinterpret the external manifestations of a sober person as symptoms of intoxication.

As a result, as many innocent persons are unprotected as guilty persons escape punishment. In many particulars, the tra-

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BUREAUCRACY AND RED TAPE

Ewell D. Moore*

THE widely acclaimed report by the Hoover commission on the high costs of government, and its partial adoption by the President, has turned a revealing spotlight on the cost of bureacracy and its red tape. Not that the average citizen was entirely without some personal experience with the long arm, and sometimes myopic view, of bureacracy; but the Hoover reports have emphasized the effects, financial and otherwise, of too much government.

"Red tape" as we use the term today, is given a meaning quite different from its ancient origin, that is, colored ribbon for tying up documents of an extremely formal nature. We now use it to imply abusive reproach for scrupulous adherence to prescribed routine, especially when the result is delay or inaction by government bureaus. "Bureaucrat," in its correct meaning, is an official who governs by rigid and arbitrary routine, who, in turn, is controlled by rules and regulations laid down by policy-making superiors.

The frustrated public, being ignorant of these rules, complains when their application pinches. Consequently, all employees of government, whether national, state, or otherwise, become "bureaucrats" in the mind of the confused public. Everybody knows about "red tape," but they do not know how this fictional and colorful entanglement is spun in endless quantity. There is a tropical vine said to have sinister power to grip anything that touches it, and if not promptly loosed will throttle the victim. Government red tape is something like that.

Government "red tape" gives rise to absurd and even humorous complications as well as complete frustration. Often the ensnared victim does not survive the unwinding process. Then it is up to his heirs to prove they were really born, are living and entitled to take up the burden of the departed ancestor, and go on from there.

Given a legislative act, federal or state, creating a new department or agency, with authority to make its rules and regulations, and the red tape spinners will do the rest. What they can draw out of an apparently simple and unambiguous statute is amazing to the ordinary layman. Soon there is a "manual" of printed rules, which grows and and grows and grows until there is a mesh of red tape

*Formerly a trustee of the association and for several years its treasurer; for several years editor of the Bulletin and for additional years a member of the Bulletin committee.

fine enough to entangle the unwary, and confuse even the lawyer he is obliged to hire to take him by the hand.

Government red tape is not new. But with the vast expansion of industry and its regulation; the increase of "government in business;" the tendency of state and city to carry their troubles and hat in hand to Washington for money and more money; the dependency of the individual upon government to keep him in a job, provide financial security in old age and a shade tree to lie under, it has multiplied in recent years beyond measure.

Now, all this would appear to portend an eventual crackup. But we have a happy faculty, or have had up to now, of working our way out of bad messes. Especially when we bring our sense of humor to bear on a given problem. Even the red tape snare is not without incidents of rare humor as well as absurdity. Like the case of the Georgia mules.

The "Georgia Mule Case" is a fictitious title, and the story is of doubtful validity. However, it is the excuse for poking fun at the red tape boys in government service. Maybe it will induce a wry smile from some of them.

It seems there was a local lawyer who was engaged by a government agency to defend a suit brought by an architect for a long overdue fee, and which red tape had successfully tied up in Washington. In due time the lawyer sent in his meticulously prepared voucher for services rendered. For more than a year he shuffled his daily mail, hoping to find the familiar slender brown envelope with green shaded window, indicating that a government check was within.

Lawyers hesitate to write about overdue fees, especially when the client is rich and important. But he concluded that a year was long enough to wait and so he studiously composed a dunning letter to his government. Not the kind a merchant might send to a debtor, curtly requesting a check by return mail, but one that approached the subject indirectly. He identified himself as a lawyer who had, a long time ago, rendered certain legal services, for which he had, in due time, forwarded his bill. But, he said, the agency probably was too busy with important matters, or it may have fallen among those annoying letters that, in most offices, daily find their way to the bottom of the pile of things to be done. He hoped it would not meet the fate of the Georgia mule claim, though it was

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BOOK REVIEW

ANNUAL SURVEY OF CALIFORNIA LAW, Vol. 1 (1948-1949), The College of Law, University of Santa Clara, Santa Clara, California, xlv, 278 pp. $5.

Busy practitioners will find this new work exceedingly helpful in keeping abreast of the legal times. Here, in one comparatively small volume, is a review of the cases, statutes and other legal material which highlighted the year June 1, 1948, to June 1, 1949. Certain members of the faculties of the law schools at the University of Santa Clara, University of Southern California, Stanford University, University of California and University of San Francisco have all contributed by writing brief articles in the various fields of law. The book is edited by Professor John Henry Merryman of Santa Clara.

To give an idea of the subjects covered, the work contains reviews on Administrative Law and Procedure, Constitutional Law, Criminal Law, Labor Law, Municipal Government, County Government, Taxation, Public Utilities, Workmen's Compensation, Torts, Conflict of Laws, Persons, Community Property, Contracts, Sales, Negotiable Instruments, Security, Creditors' Rights, Agency and Partnership, Corporations, Equity, Personal Property, Real Property, Future Interests, Trusts, Wills, Water Law, Code Pleading, Judicial Remedies and Procedure, Evidence, and Interpretation of Statutes. Each review is more than a digest but is not as lengthy, detailed or academic as most law review articles.

The problem of keeping generally informed as to important developments in the law is becoming more difficult all the time. We cannot all restrict ourselves to specialization, and for one in the general practice an annual survey such as this is a real aid. For instance, one may not be a tax specialist but he may wish to keep advised as to the significant developments in the field of estate planning. A careful reading of the reviews on Taxation, Community Property, Future Interests, Trusts, and Wills in this work will not take too long and at the minimum give the reader a few current guideposts.

This is a good book to keep not only in the library but also to have handy on the bed stand. Most of the reviews may be read in fifteen or twenty minutes and, while giving ample food for thought, may be digested before slumber, which is more than can be said for many of the current law review articles.

The Annual Survey of California Law is a most worthy enterprise and will be approved by the practicing Bar of the State. Congratulations to the University of Santa Clara in initiating this project.

FRANK S. BALTHIS.

OPINION OF THE COMMITTEE ON LEGAL ETHICS

OPINION NO. 169
(November 16, 1949)

ADVERTISING—PUBLICATION OF ATTORNEY'S NAME IN ALUMNI DIRECTORY. It is not proper for an attorney to have his name and address published in an alumni directory to be distributed among members of the alumni association and listing only those attorneys' names who pay the charge established therefor by such association.

The Committee has been asked for its opinion as to the propriety of attorneys listing their names and addresses in an alumni magazine directory, said names to be published in a listing similar to the yellow telephone directory, giving the name, address and telephone number of each attorney listed. The alumni association does not propose to publish without charge the names of all attorneys who are alumni of the university, but those who are desirous of having their names so published are to pay the rate or compensation fixed by the association for such publication.

It has been suggested that the "directory might well be considered a service to the reader rather than advertising since it is doubtful if a person would employ a lawyer merely by seeing a name in a directory," and that the value of the directory consists in the convenience of having at hand the address and phone number of an attorney already known to the reader.

The question is not, of course, a new or novel one, nor under the view we take is it a difficult one, as it involves the question of professional advertising. It is of importance, however, because it arises so often with the constantly increasing number of publications issued or sponsored by various organizations, some organized for profit and some for charitable, educational, or other purposes, and advertising is solicited in order to make them self-supporting.

Some lawyers without thought of impropriety have authorized publication of their card in such journals, directories, etc., and

some might unwittingly authorize such publication, not because they are seeking advertising from the publication, but as a contribution to the association and to help in its support.

Nevertheless, that it is advertising can hardly be questioned. The fact that the party lists himself as a lawyer, that he gives his address and telephone number where he may be reached, that he is an alumnus of the university, is brought to the attention of those members of the public who receive the directory. The further fact that a charge is made by the association for publication of the names, and that only those attorneys' names are listed who pay such charge, clearly brings the listing within the meaning and intent of advertising.

Perhaps in no phase of its self-discipline is the Bar of this state, and of the country in general, more careful, circumspect, and exacting than in its strict avoidance of any act or conduct which borders on advertising. The subject has naturally received considerable attention by the local and the national bar associations and, we believe, the answer to the question is clearly indicated in the negative. The Committee on Legal Ethics of the Los Angeles Bar Association and the Committee on Professional Ethics and Grievances of the American Bar Association, in keeping with the

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Editor in charge of this issue—Edwin W. Taylor

Silver Memories

Compiled from the Daily Journal of February, 1925
By A. Stevens Halsted, Jr., Associate Editor

A. Stevens Halsted, Jr.

Joseph McKenna, eighty-one years old last August, has retired from the United States Supreme Court after more than a quarter century of service as associate justice. Mr. Justice McKenna was appointed to the high tribunal from California. Solicitor-General **Beck** will automatically become acting Attorney-General.

* * *

Senator Shortridge has recommended Justice **A. F. St. Sure** of the California District Court of Appeal to the vacant U. S. District Court judgeship, created by the recent death of Judge **Morris T. Dooling.** Senator Johnson has recommended Judge **William H. Langdon** of San Francisco. Mrs. **Mabel Walker Willebrandt,** assistant Attorney-General, of Los Angeles, is also mentioned as a possible appointee.

* * *

Samuel W. McNabb has been appointed United States Attorney for the Southern District of California to succeed **Joseph C. Burke,** who tendered his resignation recently. McNabb has served as Mayor of San Bernardino for three terms, and has been practicing in California since 1909. Burke, together with **Mark F. Herron** and **Robert B. Camarilla,** Assistant United States Attorneys, will form a law partnership.

* * *

United States District Judge **Benjamin F. Bledsoe** has announced his candidacy for Mayor of Los Angeles. The names of Supreme Court Justice **John W. Shenk** of Los Angeles and Superior Court Judge **J. E. Wooley** of Fresno are

mentioned as possible successors to Judge Bledsoe when he resigns to run for mayor.

* * *

Albert K. Lucas, now a deputy in the office of Los Angeles County District Attorney Keyes; **J. G. Ohannesian,** Deputy District Attorney in Long Beach; **J. E. Simpson** of the Fresno United States Attorney's office; and **James Eugene Neville,** who has been engaged in private practice, will be new assistants of **S. W. McNabb,** recently appointed United States Attorney for Southern California. **J. Edwin Simpson** and **John Layng** will retain their positions in the office of the United States Attorney.

* * *

Attorney General **Harlan F. Stone's** nomination as a Supreme Court Justice to succeed **Joseph McKenna** has been confirmed by a vote of the Senate of 71 to 6, after six hours of heated debate in open executive session.

* * *

More than 2,000 bills, constitutional amendments and resolutions have been introduced in the pending session of the State Legislature. The big issues are a 1-cent increase in the gasoline tax, reapportionment of legislative districts and the appointment by the governor of a director of education to take over some of the duties of the Superintendent of Public Instruction. The bill for the creation of a public corporation to be known as the State Bar of California, commonly called the self-governing bar, is not meeting much opposition.

* * *

President **Calvin Coolidge** is urging a gradual withdrawal of the Federal government from the inheritance tax field. He condemns the present federal inheritance levy, amounting in its highest bracket to 40 percent, declaring that in some instances it, with the state levies, "closely approaches, if it is not actually, confiscation." He advocates flat repeal of federal inheritance taxes.

* * *

Harry Lutgens, executive secretary to Governor **Richardson,** has been appointed private secretary to the Governor to succeed **Joseph A. Vickers,** who resigned that position on account of ill health. Vickers, a nephew of the Governor,

intends to resume the practice of law in Los Angeles; **Fletcher Bowron,** Los Angeles attorney, has been named to succeed Lutgens as executive secretary. Bowron has for some time been a deputy in the State Corporation Department at Los Angeles.

* * *

Mrs. **Georgia P. Bullock,** attorney, has been appointed by the Board of Supervisors to succeed Police Judge **Hugh J. Crawford,** and **Joseph Marchetti** has been selected to fill the vacancy left in the Justice Court by Judge-elect **J. Walter**

Hanby. Mrs. Bullock will be the first woman to sit on the police bench in Los Angeles.

* * *

Peirson M. Hall, attorney, has announced his candidacy for councilman from the 11th ward at the next municipal election.

* * *

Now that the Presidential campaign proposals of the La Follette party to curb the powers of the Supreme Court have been "stricken by the lightning of public indignation," it is all important that "public confidence in the supreme tribunal be strengthened," advocates **James M. Beck,** Solicitor-General of the United States. Mr. Beck suggests two ways of attaining the desired end: first, the resurrection of such public interest in deliberations of the Supreme Court as was manifest a century ago; and second, the creation of a co-operative arrangement between the court, the executive and the legislative branches of the government whereby preliminary opinions upon the constitutionality of proposed legislation might be handed down, to save such legislation from later branding as unconstitutional.

* * *

Governor **Richardson** is in Los Angeles considering various locations suggested for the new site of the Southern Branch of the State University. He is an ex officio member of the Board of Regents of the University of California.

* * *

City Attorney **Jess E. Stephens** has anonunced his candidacy for reelection to succeed himself as City Attorney. He has received the endorsement of 1,000 leading business and professional men of Los Angeles. Under the new charter, the City Attorney will hold office for 4 years. Stephens has twice been elected to the position without opposition.

* * *

Justice of the Peace **William S. Baird** has been reelected presiding justice of Los Angeles township by the unanimous choice of the other nine judges who preside over the local justice courts.

* * *

Pronounced opposition exists to any further increase in the gasoline tax from the present 2 cents tax per gallon. Governor Richardson and the State Highway Commission favor an increase of one cent more to refill the depleted coffers of the Commission. The oil companies, Automobile Club of Southern California and motorists oppose any further increase. A further element is injected into the battle because Southern California counties pay approximately 58% of the tax on gasoline and only 20% is expended on highway construction in the south. Some southern business organizations are against raising more money for new highway construction until a definite program of equitable allocation and expenditure of the money is fixed by the Highway Commission based on automobile registration and population.

* * *

Speaker **Frank Merriam** is sponsoring a bill in the Legislature providing for a department of the Los Angeles Superior Court at Long Beach.

* * *

Federal Judge **George M. Bourquin**, in disposing of several cases under the Volstead Act, commented "Prohibition will be a complete success only when another generation has grown up and public opinion approves." Interspersing the testimony in another case, Judge Bourquin said "The drinker dreams of the day when whiskey will return to this land, as the Indian dreams of the return of the buffalo. One will return as soon as the other."

* * *

Serious consideration is being given by the United States Mail to the establishment of a direct transcontinental air route to Los Angeles. This new service is needed because of the mass of business originating in Los Angeles and the loss of time sustained by having to route air mail by train either to San Francisco or Salt Lake. Whether or not transcontinental air mail service will be supported by the public to a degree which will warrant its continuation is still an open question.

* * *

New model automobiles are featuring full balloon tires, disc wheels, four-wheel brakes and alemite lubrication. Among the

popular models are the Rickenbacker, Marmon, Wills-St. Claire, Balboa, Cadillac, Apperson, Cleveland, Reo, Stearns-Knight, Hudson, Packard, Maxwell, Nash, Chandler, Buick, Flint, Jordon, Star, Oakland, Moon, Rollin, Jewett, Essex, Graham and Durant.

LANGUAGE FROM THE SUPREME COURT

Mr. Justice Burton, dissenting in the case of *Manufacturers Trust Co. v. Becker* (Nov. 21, 1949), in which the majority opinion held that if corporate bonds are purchased at a great discount by corporate officers or their relatives at a time when the corporation is technically insolvent, such bonds may nevertheless be enforced by them at full value, said:

> "While corporate directors are not classed as express trustees, their obligations to their respective corporations are fiduciary in character. The more precarious the condition of the corporation, the more it needs the undivided loyalty of its directors. Conflicts of interest must be resolved in its favor. . . ."
>
> "As long as a corporation enjoys the healthy status of a going concern, its directors generally may invest freely in its securities without accountability for their resulting profits. Their directorships should make them accountable for such profits when their personal interests as purchaser of securities may conflict with their obligations as directors. A mere excess of a corporation's liabilities over its assets may not subject its directors to this accountability. Nevertheless, any evidence of the personal instability of their corporation obligates the directors to overcome whatever presumption of conflict of interests between their own and those of the corporation or of its creditors that such evidence presents."
>
> "In the instant case there should be a finding whether or not, at the time of the purchases of the debentures in question, there was a sufficient prospect of liquidation to bring the interests of directors as debenture purchasers into conflict with the interests of their corporation."

LEGAL ETHICS OPINION NO. 169

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constant development of the law and the imposition of higher standards and ideals on the conduct of the members of the Bar, uniformly have held that the canons of ethics prohibit all forms of advertising for professional business.

Following this general rule, the bar associations do not approve of the publication of a lawyer's card in a metropolitan daily paper, or in trade journals, magazines, programs, or other publications sponsored by associations, clubs, societies, fraternities or other organizations, irrespective of whether they are organized for profit or for charitable, educational, civic, social or trade purposes. Our opinions hold uniformly that the publication of a lawyer's card is advertising to procure business and, unless it falls within the sanction of "local custom" which is not involved herein, is prohibited and must be regarded as improper, regardless of the intent which actuates it.

Since there is no substantial difference between the information contained in a lawyer's card, as defined by Canon 43 of Canons of Professional Ethics of the American Bar Association and that proposed to be published in the alumni directory, and since there can be no question about it being advertising, we must, perforce, express disapproval of such listing.

In support of the foregoing opinion, in addition to the references given, the Committee cites the following: Rules of Professional Conduct of the State Bar of California, Rule 2, Section B, Opinions of the Committee on Legal Ethics of the Los Angeles Bar Association, numbers 1, 11, 38, 58, 78, 92, 100, 160; Opinions of the Committee on Professional Ethics Grievances of the American Bar Association, numbers 24, 69, 116, 133, 182, and 203; Canons of Professional Ethics of the American Bar Association, Canon 27.

This opinion, like all opinions of this Committee, is advisory only (By-Laws, Article VIII, Section 3).

OPINION OF THE COMMITTEE ON LEGAL ETHICS

OPINION NO. 170

(November 22, 1949)

ADVERSE AND CONFLICTING INTERESTS—REPRESENTING BOTH HUSBAND AND WIFE IN NEGOTIATING A SETTLEMENT AGREEMENT. Although sound practice requires that each spouse be represented by independent counsel, or at least have competent advice from someone other than the attorney for the other spouse, it is not unethical for the attorney for one of the parties to deal directly with the other if he is compelled to do so and acts fairly and objectively.

The Committee has been asked, if in its opiinon, in view of the holdings of the California Appellate Courts in *Hilton v. Hilton*, 54 Cal. App. 142, 145; *Swart v. Johnson*, 48 Cal. App. (2d) 829, 832; *Andrew v. Andrew*, 51 Cal. App. (2d) 451, 455, it is ethical for an attorney to prepare a settlement agreement when the opposing spouse is not represented by counsel.

In the case of *Hilton v. Hilton*, 54 Cal. App. 142, 145, the Court had this to say:

> "Moreover, the rule is that in transactions involving the transfer of property between the husband and wife the latter should have 'the benefit of a full, free and private preliminary conference with a competent lawyer or business man who was employed and paid by her in whom she has confidence and who would be devoted to her interest and hers only.' (Pironi v. Corrigan, 47 N. J. Eq. 157, (20 Atl. 227); Yordi v. Yordi, 6 Cal. App. 20, (91 Pac. 348), and cases therein cited.)"

If we consider this case along with *Andrew v. Andrew,* 51 Cal. App. (2d) 451, 455, it would seem that sound practice demands that each spouse be represented by counsel, or at least have competent advice from someone other than the attorney for the other spouse. In *Andrew v. Andrew* the Court said, referring to a property settlement contract between husband and wife:

> "Before it was executed it is not even claimed that plaintiff had had the benefit of independent legal advice." (p. 455.)

and

> "Being a purported contract between husband and wife, it was between those standing in a confidential relation and was presumed to be fraudulent. (Civ. Code, Sec. 2235.) That presumption continued until it was dispelled and the burden of dispelling such presumption rested on the husband. (Odell v. Moss, 130 Cal. 352, 357 (62 Pac. 555).)"

Since this Committee's opinion was originally requested, the District Court of Appeal of this State has decided *Gregory v. Gregory,* 92 A. C. A. 414, 420, and there says:

> "While it frequently occurs in negotiations between husband and wife for settlement of property matters that one attorney serves both parties, it has been said 'that in fairness to both parties concerned, when negotiations for settlement of property matters between husband and wife are on hand, both parties should at all times be represented by counsel.' (Swart v. Johnson, 48 Cal. App. 2d 829, 833 (120 P. 2d 699).) And, as we said in Davidson v. Davidson, 90 A. C. A. 949 (204 P. 2d 71), where the situation was quite different from that in the case at bar (p. 958): 'It is, of course, much better for all concerned if both sides have independent counsel, but there is no way by which a litigant can be compelled to secure an attorney. Where the attorney for one of the parties is compelled to deal di-

> rectly with the other litigant he is under a most strict duty to deal with such litigant fairly and objectively, and the agreement will be scrutinized most carefully to be sure that there has been no overreaching.' At least the attorney should make sure that each party is fully advised as to his or her legal rights and to the right to independent counsel."

This case frankly states what should be done by an attorney if called upon to deal directly with the other party.

In addition to the foregoing, there is Canon 6 of the Canons of Professional Ethics of the American Bar Association, reading:

> "It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.
>
> "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

Opinion 224 of the Opinions of the Committee on Professional Ethics and Grievances of the American Bar Association, in considering whether an attorney may properly accept employment from a corporation for the purpose of drawing instruments of conveyances in order to consummate an agreement which the corporation has made with a private individual, has this to say:

> "Where two parties have entered into a valid agreement, the consummation of which requires legal advice and services, either of such parties may properly employ an attorney to draw the legal documents necessary to carry out their agreement. The fact that the other party does not see fit to employ an attorney in such cases does not affect the propriety of the first attorney acting, provided he in no way represents himself as advising the second party. * * *
>
> "Accordingly we deem it improper in such a case for the attorney to accept employment from a corporation, unless the home owner is clearly advised that he should have counsel and the reasons therefor."

Rule 7 of the Rules of Professional Conduct of the State Bar of California provides:

> "A member of the State Bar shall not represent conflicting interests except with the consent of all parties concerned."

In *Swart v. Johnson,* 48 Cal. App. (2d) 829, 832, the Court felt impelled to add a few remarks concerning the circumstances under which a deed had been executed, which we believe are appropriate here. We quote:

> "While it is not necessary to a decision in this case, nevertheless we have concluded that something should be said about the circumstances when the plaintiff's quitclaim deed of the apartment house was made to the decedent. The deed was prepared in the office of attorneys for the decedent after the divorce complaint had been filed and served; it was there presented to the plaintiff, when he also signed an agreement denominated a 'Mutual Release,' and was paid by counsel for decedent $400.
> * * *
> "The plaintiff was not represented or accompanied by counsel when the quitclaim deed and the release were presented to him for signature, in the office of his wife's lawyers. This situation illustrates a fact which should be evident to all members of the bar of this state—that in fairness to both parties concerned, when negotiations for settlement of property matters between husband and wife are on hand, both parties should at all times be represented by counsel."

If however the attorney is compelled to deal directly with the other litigant and does so fairly and objectively and in accordance with the rules and canons above referred to, it is the opinion of this Committee that such cannot be said to be unethical.

However, bearing in mind the attitude of the Courts from the foregoing cases, it would seem that every effort possible should be made by an attorney to see that each spouse is represented by counsel of his or her own choice. If this is not done and an attorney represents both parties, the property agreement is predicated upon uncertain foundations and subject to be set aside upon slight evidence. This may result in loss or prejudice to the one without fault who was represented by counsel and whose counsel should have seen that his client's interests were safeguarded to the fullest extent possible.

This opinion, like all opinions of this Committee, is advisory only (By-Laws, Article VIII, Section 3).

RELIEF AGAINST FORFEITURE, ALTHOUGH TIME OF THE ESSENCE.

For over 50 years, it has been thought that the case of *Glock v. Howard & Wilson Colony Co.* (1898), 123 C. 1, held that a defaulting vendee under an installment contract for the sale of land in which time was of the essence could not have rescission and restitution of installments paid upon a tardy tender of installments due plus the entire balance of the purchase price. The case gave no consideration to Section 3275 of the Civil Code, which provides for relief from a forfeiture upon the making of full compensation except in cases of grossly negligent, willful, or fraudulent breaches of duty. Perhaps for this reason, the rule of the Glock case has been criticized ((1939) 27 CAL. L. REV. 583; (1929) 18 CAL. L. REV. 681), distinguished, and even ignored. In *Ebbert v. Mercantile Trust Co.*, 213 Cal. 496 (1931), the *Glock* case was restricted to instances where a condition precedent was breached; if the default occurred in connection with a condition subsequent, relief might be had. Moreover, the California courts proved adept at developing a liberal rule of waiver to avoid some of the harsh effects of the *Glock* rule. (See, *e.g., Boone v. Templeman,* 158 Cal. 290 (1910).)

In a number of District Court of Appeal cases, Section 3275 was applied without reference to the *Glock* case. (See, *e.g., Fickbohm v. Knaust,* 103 C. A. 443 (1930); *Miller v. Modern Motor Co.,* 107 C. A. 38 (1930).)

On the other hand, the *Glock* case has been suported by statements such as that in *Henck v. Lake Hemet Water Co.,* 9 C. (2d) 136, 143 (1937), that:

> "The provisions of section 3275 are necessarily qualified by the language of Section 1492, so that generally in a case where time is made the essence of the agreement a party may not obtain relief under that section."[5]

In the recent case of *Barkis v. Scott,* 34 A. C. 157 (July 1, 1949), the Supreme Court was confronted with a default by a vendee under an installment land contract, in which time was expressly declared to be of the essence. The default was occasioned by the dishonor of two checks sent to the vendor on account of the

June and August payments under the contract. Vendee had made 57 monthly payments theretofore and had made permanent improvements on the property of a value in excess of $3,000. Vendor notified vendee that he had elected to declare a forfeiture but vendee immediately tendered certified checks and upon their refusal opened an account under Section 1500 of Civil Code and deposited all amounts coming due under the contract. Vendor then brought this action to quiet title. *Held,* vendee was entitled to relief under Section 3275 of the Civil Code. The Court overruled a finding of the trial court that the default was "grossly negligent and a willful breach of duty" as being contrary to the evidence. The *Glock* case, the Court ruled, "recognized, that under certain circumstances a default, even when time was of the essence, could be relieved against . . ." While one might wish along with dissenting Justice Schauer (34 A. C. 165) that the Court had been more direct in its approach to the *Glock* case, it now appears to be established that relief against forfeiture may be had under Section 3275 in all cases, whether or not time is of the essence.

BUREAUCRACY AND RED TAPE

(Continued from page 166)

unlikely that any newcomer to Washington would remember it. However, since his case had the same element of financial suspense as the mule claim, it might be well to advert to it briefly.

At the beginning of the civil war, he said, there was a kind hearted Georgia plantation owner who freed a favorite old colored man and his family, and gave them five acres of land a span of young upstanding mules. The old man and his numerous progeny were doing right well on hog jowl and hominy when along came Sherman's army in its march to the sea. They made no distinction as to ownership of property, and swept away the black man's mules with the white man's chattels. Long after the war was over a white friend filed a claim for the old man with the government for the confiscated mules. Everybody said: "Why, yes, sure! Dam shame. You cain't do that to a free, peaceful citizen of this great republic. That claim will be paid quick."

Well, the old man lived out his span of life in hope and waiting. He passed the claim on to his oldest son, confident that justice would be done. "Son," he said, "you'll get the Gov'ment money right soon. They just been too busy to pester with my li'l ol' claim. But it'll be along soon and will nigh make you rich, what with intrust, and all." The son waited, worked and hoped. In time he, too, handed down the claim to his heirs, confident that the Gov'ment always pays its debts. Came the third generation; a free-wheeling, snake-hipped, jazz age. Grandpa's old mule claim was too far in the past for them to worry about.

One day someone in the catacombs of bureaucracy, in order to make way for a new agency of government, waded through a mass of tape smothered documents and came upon the claim of the old colored man where it mouldered for many decades of bureaucratic administrations. The claim had been allowed in 1875! Investigations were ordered; letters and memos, directives and reports prepared; summaries and analyses, opinions and all the other strange communications of bureaucracy circulated. Field agents were hurried south to interview the heirs, if any were living, and ascertain the facts and incidents concerning the old man and the mules. Yes, they found several third generation descendants who ordinarily would have qualified to pull down old grandpap's mule money, with interest. But the government, as often happens, had laid down the

rule that inasmuch as the mules were not available for identification, the heir claimants must at least furnish the names of the two animals. One heir of the fourth generation, quick at improvising, said he heard his grandmammy speak of one of the mules as "Ben," but no one could name the other member of the now celebrated team that disappeared with the dust of Sherman's army.

The case file in Washington grew to monumental size. No one would take the responsibility of modifying the rule laid down by the top tape-makers that both mules must be named before the claim could be paid. No, sir! Congress might demand the file any time, and somebody called before a committee to explain why only one mule was named, when everybody knows a team is two mules. And so the mule case was closed. But what to do with the money that had been appropriated to pay for the mules, way back in 1875? There were long and deep deliberations of heads of departments, legal counsel and searchers of precedents. Finally, a directive was composed, edited and issued. It ordered the money "covered" into the treasury, from which there is no recall. Once there it becomes as lifeless as grandpap and his mules; as final as the Supreme Court's refusal to review.

The dunning lawyer closed his appeal to have his bill rescued from the strangling tentacles of red tape, given air and fanned back to life and activity. By airmail he received a slim brown envelope with green window. The fictional mule story had cut the red tape.

COUNTY LAW LIBRARIAN APPOINTED

Mr. Forrest S. Drummond has been appointed librarian of the County Law Library. He assumed his duties on February 1.

Mr. Drummond has been the assistant librarian for the Association of the Bar of the City of New York. Before the war he was librarian of the University of Chicago Law Library, and before that, during the 30's, he practiced law in Illinois. Mr. Drummond during the war was a Lieutenant Commander. His service included the post of communications officer on the USS Texas.

The Los Angeles Bar Association welcomes Mr. Drummond, and at the same time expresses its appreciation for the excellent work that has been done by Mr. Robert T. Andersen, who has been acting librarian.

THE DRUNK DRIVING PROBLEM

(Continued from page 164)

ditional method of determining sobriety is inaccurate, inadequate, and scientifically outmoded.

First of all, many pathological conditions will produce symptoms similar to those produced by alcohol; such as, brain concussion, high blood pressure, use of barbital derivatives and sedatives, food poisoning, overdose or underdose of insulin in diabetics, permanent injuries, plain nervousness, shock, or permanent or temporary nervous affliction.

Secondly, the lay person, no matter who he may be, is unable, in many instances, to identify intoxication from the outward appearances of a sober person. Some, by nature, are hilarious, despondent, argumentative, or belligerent; and a person having one or more of these characteristics may be considered intoxicated if he has an alcoholic breath. Others of a retiring, quiet, reserved nature may appear completely sober while, in reality, they have lost essential control of their driving ability, but because of their physical makeup and appearance, no symptoms of intoxication exist for identification, as such.

Thirdly, consideration of the kind and quantity of liquor consumed is not a fair test. Actually, it is no criterion of the degree of sobriety; and medical science definitely demonstrates that the intoxicating effect of alcohol is produced by the amount of alcohol accumulated in the brain, and not by the kind or quantity consumed. The amount present in the brain is the net result of a variety of factors; such as, health, weight, amount of food in the stomach, rate of alcohol absorption into the blood stream, and the rate at which alcohol is oxidized.

Fourth, it is too difficult for a lay person to identify the so-called moderately intoxicated person. The more drunk a person is, the easier it is to identify him as such, but the drunk is not the dangerous driver. He drives from three to five miles per hour down the center of the road, concentrating on straddling the center white line, or drives off to the side of the road and falls asleep. The real traffic hazard is the person who has had enough to drink to impair his driving ability, but not enough to affect his appearance. Unfortunately, his impairment of driving ability occurs too often before he has reached a point of intoxication which can be identified through observation of external manifestations.

Fifth, a lay person cannot, with any accuracy, determine whether or not a driver has reached that stage of intoxication at which he actually succumbs to the influence of alcohol. The burden is on the prosecution to prove, first, that point on the scale of intoxication at which a person yields to the influence; and, second, that the defendant has reached that point.

Last, the use of opinion evidence creates many administrative and enforcement difficulties.

Many a jury, realizing the weaknesses of lay testimony, is prone to improperly consider with the evidence possible penalty, economic loss, social ostracism and hardship on the defendant, if convicted, and is reluctant to accept opinion evidence as against the testimony of the defendant, particularly when adroit defense counsel offers evidence of illness or injury which may or may not have contributed to his condition.

It is obvious, therefore, that something in addition to the traditional means of determining sobriety by observation should be demanded. This can be found in chemical tests given to the motorist immediately after apprehension. They can now be utilized to accurately ascertain the percentage of alcohol in the blood stream, from which the extent of inebriation can be definitely calculated. Whether the substance analyzed be urine, saliva, spinal fluid, blood, or breath, the result is the same and is expressed in terms of percentage of alcohol in the blood. This is the only true and accurate test of determining sobriety, since it discloses the amount of alcohol actually absorbed into the blood conveyed to the brain, which is the cause of a state of intoxication.

In the last ten years, experimentation has perfected a chart universally used to determine sobriety, which establishes four broad zones of alcohol concentration. This chart is recognized by the American Medical Association, National Safety Council, and the American Bar Association.

Zone (1) includes alcohol concentration in the blood of from 0.0% to 0.05%. Persons in this class are sober and their driving ability is unaffected. The results of the test showing these percentages are *prima facie* evidence of sobriety. This zone generally represents two beers or two ounces of one hundred proof whiskey.

Zone (2) includes blood alcohol concentration of from 0.05% to 0.15%. Some persons in this class are under the influence and others are not, but as the percentage rises so does the degree of intoxication. The results of the test used to determine alcohol concentration are corroborative only, and not *prima facie* evidence of intoxication. This level generally represents two to six ounces of one hundred proof whiskey.

Zone (3) represents 0.15% to 0.5% alcohol concentration in the blood, and persons falling in this class are under the influence of intoxicating liquor, incapable of driving safely. The results of the test are *prima facie* evidence of intoxication. The lower level of this zone generally represents six ounces of one hundred proof whiskey.

Zone (4) includes alcoholic concentration above 0.5%. Persons in this zone are dead drunk and in a condition similar to surgical anesthesia.

For chemical tests the extraction of many substances; such as, blood, spinal fluid, urine, and saliva cannot be made in the field because it requires special equipment, sanitary conditions, and trained operators, and, in addition, presents legal questions of force, coercion and assault.

The chemical test using breath is by far the most practical, and its use presents no serious constitutional questions. The courts have held that as the defendant exhales, his breath becomes common property as part of the air, and it can be taken without legal limitations. Furthermore, chemical analysis of breath is accurate beyond doubt, for it comes into intimate contact with blood in the lungs, and the concentration of alcohol in the breath is controlled by the percentage of alcohol in the blood stream.

There are two breath analytical methods available—the Drunkometer, now successfully used in the City of Pasadena, and the Intoxometer. The Drunkometer, designed by Dr. R. N. Harger, analyzes the chemical contents of breath which has been caught in a balloon and forced through certain chemicals. This machine is impractical for use in the field because of its size.

The Intoxometer, invented by Dr. Forester, operates on the same principle but is portable and designed for use in the field. A chemical analysis can be made immediately after the motorist is apprehended, and the result, within minutes after the test, will disclose the true condition of the driver immediately after he has been stopped in his automobile. The chemical reaction of the alcohol contained in the breath will produce the showing necessary to determine in what zone of intoxication, if any, the driver falls.

California has no legislation permitting the use of evidence obtained through chemical tests, although our courts have recognized and accepted their results as evidence. The ordinary constitutional questions find no place in the use of breath test results, since the defendant is not required to do any act, identify the breath specimen, or make any statement in connection with it.

From a legislative point of view, a law could be enacted to either require a person to give his consent in writing to such a test before an operator's license is issued to him, or to provide for an automatic revocation of the operator's license or driving privileges if he refuses to submit to such a test when requested and required by the proper authorities and at the proper time.

Although the privilege against self-incrimination relates generally only to utterances, the constitutional question relating to this problem is often raised in connection with the use of chemical tests. In the use of the proposed legislation, the privilege would be waived and possible coercion and force would be replaced by consent. The exercise of the State's police power in this connection is beyond question in view of the State's right to regulate the use of the highways. Since use is a privilege which could be completely abolished, it can legally be restricted for the safety of the general public. Such legislation would be similar to that already in effect requiring premarital blood tests of persons intending to marry, in which the law, although it cannot force the taking of such a test, can and will refuse the parties a license to marry in this state.

In conclusion, your attention is called to another problem relating to prosecutions under Section 502 of the Vehicle Code which arises out of the license suspension provisions, especially in cases involving second or subsequent violations. The new amendments to the law, which went into effect last October, permitting the court to exercise its discretion in restoring the offender's operator's license or driving privilege, applies only to a first offense. Therefore, it should be borne in mind that the problem under discussion grows out of second and subsequent violations. The law relating to these offenses remains the same and the driving privilege and operator's license, upon conviction or plea of guilty, is suspended or revoked for a period of one year, except in cases in which three or more violations have occurred since December 31, 1941, in which event the period of suspension or revocation is for three years. In any case, however, after the suspension period has expired, the offender is required by the Department of Motor Vehicles to give proof of ability to respond in damages before his license or driving privilege can be restored to him.

To the average person, loss of an operator's license or driving privilege is a mere inconvenience, but to a person earning his livelihood by the use of his automobile, it constitutes a definite hardship. This added penalty has given rise to a practice followed in many communities, which to safety-minded persons is most objectionable, but to others is a life raft in a turbulent sea. Most cities have passed ordinances punishing drunkenness in a public place as a misdemeanor; and although the ordinance does not and cannot mention the operation of a motor vehicle while in such a condition, since such an offense is already covered by the Vehicle Code, many of these communities, to evade the hardship of suspended licenses, indulge in the practice of ignoring the

application of Section 502 of the Vehicle Code and prosecute only under the municipal ordinance, labelling the charge "drunk auto." Los Angeles is not one of the communities following this practice, although in some instances, because one or more of the elements of the offense of driving while under the influence of intoxicating liquor cannot be proved, the City Attorney will reduce the original charge of violation of Section 502 of the Vehicle Code to a lesser offense, which does not suffer the offender the loss of his driving privilege.

Persons favoring prosecution of a drunk driver on a "drunk auto" charge under the municipal ordinance in order to save the offender's operator's license, subscribe to the theory of "use of discretion by the prosecuting agency to prevent hardship." It is true that in many instances license suspension creates a hardship on the innocent members of the defendant's family, particularly if he is past middle age, earns his livelihood by the use of his automobile, is untrained to do other work, and subject to the loss of either his seniority or his job. The problem becomes more acute as jobs become harder to obtain.

The position criticizing this view holds that if there are present all of the elements necessary for a conviction under Section 502 of the Vehicle Code, the prosecuting agency should charge such a violation and not reduce the offense to one under the municipal ordinance. To do otherwise is to practice an outright circumvention of the law by the defendant and the prosecuting agency, in which the court unwittingly becomes a party. Not only does such a practice engender criticism by the public, create a bad effect on police morale, permit the man who has been convicted of a prior offense of driving while intoxicated, who either has no respect for our laws or thinks he can "get away" with such a violation, to escape punishment; but it would, without doubt, encourage subsequent violations for the person who lives in a community which does not enforce the law as written. Such an attitude contributes nothing towards solving the safety problem caused by drunk driving, because the force of the law is completely lost.

Whichever view is preferred, both the dangers of prosecuting under the municipal ordinance instead of Section 502 of the Vehicle Code, as well as the economic hardship that results from license suspension under the Vehicle Code should be kept in mind.

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